

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

CSX TRANSPORTATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:21-cv-02859-JRS-MJD
	)	
ZAYO GROUP, LLC,	)	
	)	
Defendant.	)	

**REPORT AND RECOMMENDATION**

The Court<sup>1</sup> designated the Undersigned to issue a report and recommendation "that sets forth as to each disputed site whether [Plaintiff's] claims as to such site were resolved against [Plaintiff] by the Court's summary judgment ruling." [[Dkt. 644 at 1-2.](#)] The Undersigned now does so.

**I. Background**

Plaintiff operates railroad lines across Indiana and Illinois. In a nutshell, Plaintiff alleges in this case that Defendant committed various torts when it installed underground and aerial fiber optic cable (hereinafter referred to simply as "cable") on (or over) property in which Plaintiff has a property interest. Plaintiff initially sued on claims relating to only a handful of cable installation sites, but later expanded its claims with its Third Amended Complaint, [[Dkt. 210](#)], to encompass more than 400 sites. Plaintiff asserted the following claims:

- Count I – criminal trespass under the Indiana Crime Victim's Relief Act ("ICVRA");
- Count II – railroad mischief under the ICVRA;

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<sup>1</sup> This case was initially pending before Judge Magnus-Stinson. It was reassigned to Judge Young on July 17, 2024, and then to Judge Sweeney on July 24, 2024. [[Dkt. 653](#); [Dkt. 654](#).] The Undersigned uses "the Court" to refer to the district judge who was presiding at the relevant time.

- Count III – deception under the ICVRA;
- Count IV – theft or criminal conversion under the ICVRA (hereinafter referred to as simply "theft");
- Count V – civil trespass to land;
- Count VI – civil trespass to Plaintiff's components;
- Count VII – unjust enrichment;
- Count VIII – rent;
- Count IX – declaratory judgment related to Defendant's "unilateral and unauthorized actions"; and
- Count X – declaratory judgment as to the Jackson Street Location.

[[Dkt. 210.](#)]

Defendant filed a motion for partial summary judgment on September 8, 2023, [[Dkt. 417](#)], which the Court granted in part and denied in part on April 23, 2024. [[Dkt. 607.](#)]

Specifically, with regard to Plaintiff's claims relating to sites located in Indiana,<sup>2</sup> the Court found that Plaintiff lacked standing to pursue claims for criminal trespass (Count I), civil trespass to land (Count V), and rent (Count VIII) as to sites for which Plaintiff only possessed an easement, rather than a fee interest. Those claims were thus dismissed without prejudice. *Id.* at 19-20, 21. The Court also found that Plaintiff lacked standing to assert its claims for criminal deception (Count III) and railroad mischief (Count II) because Plaintiff failed to make the requisite showing of injury-in-fact as to those claims. Those claims were also dismissed without prejudice. *Id.* at 28, 33. The Court granted summary judgment as to Plaintiff's claims for trespass (Counts I and V) and rent (Count VIII) as to cable installations that occurred on Indiana public rights-of-way. *Id.* at 26. Summary judgment also was granted as to three sites as to which Defendant asserted that the cable installations were made on another railroad's conduit with that railroad's permission, *id.* at 33, and as to Plaintiff's request for the remedy of disgorgement, *id.* at

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<sup>2</sup> The summary judgment order also addressed certain claims relating to sites located in Illinois, but all Illinois-based claims were later dismissed for lack of personal jurisdiction. *See* [[Dkt. 741](#)].

41. The Court also granted summary judgment on statute of limitations grounds as to Plaintiff's criminal trespass claims (Count I) and theft claims (Count IV) related to installations that occurred before November 16, 2019, and civil trespass to land claims (Counts V and VI) and rent claims (Count VIII) related to installations that occurred before November 16, 2015.<sup>3</sup> *Id.* at 47. Finally, with regard to Plaintiff's claim for unjust enrichment (Count VII), the Court found the following:

For sites where the Court has not granted summary judgment on [Plaintiff's] civil trespass to land and rent claims, an adequate remedy at law exists through those claims and the Court **GRANTS** [Defendant's] Motion for Partial Summary Judgment as to the corresponding unjust enrichment claims. For sites where the Court has found that [Plaintiff] lacks standing and has dismissed [Plaintiff's] civil trespass to land and rent claims (*e.g.*, where the installation was at a site for which [Plaintiff] has an easement), the Court **DISMISSES** the corresponding unjust enrichment claims **WITHOUT PREJUDICE**. For sites where the Court has granted summary judgment in favor of [Defendant] on the civil trespass to land and rent claims (*e.g.*, because the installation was on a public road right-of-way), [Plaintiff's] corresponding unjust enrichment claims fail and the Court **GRANTS** [Defendant's] Motion for Partial Summary Judgment on the unjust enrichment claims related to those sites.

*Id.* at 37. Following the summary judgment ruling, Plaintiff filed a Motion to Modify the Court's Summary Judgment Order to Allow Interlocutory Review, [[Dkt. 624](#)], which the Court denied in its entirety on June 24, 2024, [[Dkt. 632](#)].

At the end of the summary judgment order, the Court instructed the parties "to confer, to attempt to agree regarding which specific sites remain implicated after the Court's rulings, and to file a Joint Report by May 22, 2024[,] setting forth which sites remain implicated for each remaining claim." [[Dkt. 607 at 58.](#)] The Court further instructed that the Joint Report should

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<sup>3</sup> Excepted from this ruling were a few sites as to which Plaintiff submitted evidence that Defendant's markers were missing, which Plaintiff alleged affected its ability to discover the cable installations on those sites.

only include the following Indiana-based claims, because all other claims had been resolved by the summary judgment order:

- Count I (criminal trespass): In Indiana, sites:
  - for which [Plaintiff] does not hold an easement; and
  - where the installation was not on a public road right-of-way; and
  - where the installation occurred after November 16, 2019 (unless it is one of the [s]ites for which [Plaintiff] submitted evidence indicating that [Defendant's] markers were missing); and
  - the sites identified as 18089 0056 and 18089 0060;
- Count IV (theft): In Indiana, sites where the installation occurred after November 16, 2019 (unless it is one of the [s]ites for which [Plaintiff] submitted evidence indicating that [Defendant's] markers were missing);
- Count V (civil trespass to land): sites:
  - in Indiana . . . for which [Plaintiff] does not hold an easement; and
  - in Indiana where the installation was not on a public road right-of-way; and
  - in Indiana where the installation occurred after November 16, 2015 (unless it is one of the [s]ites for which [Plaintiff] submitted evidence indicating that [Defendant's] markers were missing); and
  - ...
  - the sites identified as 18089 0056 and 18089 0060; . . .
- Count VI (civil trespass to components): sites:
  - in Indiana where the installation occurred after November 16, 2015 (unless [Plaintiff] submitted evidence indicating that [Defendant's] markers were missing); . . .
- Count VIII (rent): only sites in Indiana . . . that are already included on the list in connection with Count V;
- Count IX (declaratory judgment): only sites in Indiana . . . that are already included on the list; and
- Count X: only sites related to the Jackson Street Location that [Plaintiff] claims fall outside of the public road right-of-way.

*Id.* at 58-60 (footnotes omitted).

Plaintiff and Defendant filed their Joint Status Report as ordered. [[Dkt. 609](#).] The Joint Status Report reflected a reduction in the number of sites with pending claims to approximately 140, but disputes remained as to whether claims for some of those sites were resolved by the

Court's partial summary judgment order. *See* [Dkt. 609-1]. Some of those disputes have subsequently been resolved by the parties. *See* [Dkt. 723, Dkt. 732.] Others have been resolved by the Court's dismissal of all of Plaintiff's Illinois-based claims for lack of personal jurisdiction. [Dkt. 741.] Still others will be resolved if the Undersigned's Report and Recommendation granting Defendant's partial motion to dismiss, [Dkt. 637], which has been issued separately this date, is adopted by the Court.

The Undersigned has been tasked with "set[ting] forth as to each disputed site whether [Plaintiff's] claims as to such site were resolved against [Plaintiff] by the Court's summary judgment ruling and, if not, which claims remain at issue for trial." [Dkt. 644.] The Undersigned does so below.

## **II. Sites as to Which the Parties Agree No Claims Remain for Trial**

With regard to the following sites, the Parties have agreed that, given the summary judgment Order, there are no claims that remain for trial:<sup>4</sup>

- Site 2 (alternatively identified using: 17031 0055)<sup>5</sup>
- Site 3 (alternatively identified using: 17031 0041)
- Site 4 (alternatively identified using: 17031 0315)
- Site 5 (alternatively identified using: 17031 0341)
- Site 6 (alternatively identified using: 17031 0055)
- Site 7 (no alternative identifier provided)
- Site 8 (alternatively identified using: 17031 0247)
- Site 9 (alternatively identified using: 17031 0270)
- Site 10 (alternatively identified using: 17031 0512)

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<sup>4</sup> By so agreeing, the parties do not waive any issues they may have for appeal with regard to the Court's various rulings. *See* [Dkt. 673] ("Complying with this directive will not waive any argument a party might wish to make on appeal, as this Order expressly precludes the parties from making arguments contrary to the summary judgment ruling.").

<sup>5</sup> The sites are listed sequentially as they are set forth in Exhibit A to Plaintiff's Third Amended Complaint, [Dkt. 210-1]. That exhibit does not include entries for Site 1, Site 32, Site 33, Site 37, Site 38, Site 54, Site 58, Site 73, Site 98, Site 132, Site 164, Site 171, Site 176, Site 205, Site 206, Site 212, Site 213, Site 214, and Site 219. In other words, there are no sites at issue in this case denominated by those site numbers.

- Site 11 (alternatively identified using: 17167 0023)
- Site 12 (alternatively identified using: 17031 0513)
- Site 13 (alternatively identified using: 17031 0515)
- Site 14 (alternatively identified using: 17031 0247)
- Site 15 (alternatively identified using: 17031 0172)
- Site 16 (alternatively identified using: 17197 0002)
- Site 17 (alternatively identified using: 17197 0028)
- Site 18 (alternatively identified using: 17197 0028)
- Site 19 (alternatively identified using: 17197 0032)
- Site 20 (alternatively identified using: 17063 0001)
- Site 21 (alternatively identified using: 17063 0011)
- Site 22 (alternatively identified using: 17063 0014)
- Site 23 (alternatively identified using: 17099 0035)
- Site 24 (alternatively identified using: 17099 0001)
- Site 25 (alternatively identified using: 17099 0017)
- Site 26 (alternatively identified using: 17099 0022)
- Site 27 (alternatively identified using: 17099 0002)
- Site 28 (alternatively identified using: 17099 0007)
- Site 29 (alternatively identified using: 17099 0073)
- Site 30 (alternatively identified using: 17031 0247)
- Site 31 (alternatively identified using: 17031 0172)
- Site 34 (alternatively identified using: 17031 0512)
- Site 35 (alternatively identified using: 17031 0254)
- Site 36 (alternatively identified using: 17031 0504)
- Site 39 (alternatively identified using: 17031 0150)
- Site 40 (alternatively identified using: 17031 0516)
- Site 44 (alternatively identified using: 18097 0135)
- Site 48 (alternatively identified using: 18097 0135)
- Site 50 (alternatively identified using: 18097 0143)
- Site 51 (alternatively identified using: 18097 0061)
- Site 52 (alternatively identified using: 18097 0213)
- Site 55 (alternatively identified using: 18051 0018)
- Site 57 (alternatively identified using: 18051 0053, 18051 0029, and 18051 0012);
- Site 65 (alternatively identified using: 18107 0039)
- Site 70 (alternatively identified using: 18163 0137)
- Site 75 (alternatively identified using: 18051 0050)
- Site 77 (alternatively identified using: 18051 0003)
- Site 79 (alternatively identified using: 18081 0012)

- Site 81 (alternatively identified using: 18035 0034)
- Site 82 (alternatively identified using: 18041 0011)
- Site 83 (alternatively identified using: 18095 0011)
- Site 84 (alternatively identified using: 18005 0022)
- Site 86 (alternatively identified using: 18085 0011)
- Site 88 (alternatively identified using: 18127 0038)
- Site 89 (alternatively identified using: 18033 0020)
- Site 90 (alternatively identified using: 18089 0084)
- Site 91 (alternatively identified using: 18089 0085)
- Site 92 (alternatively identified using: 18089 0089)
- Site 93 (alternatively identified using: 18161 0023)
- Site 94 (alternatively identified using: 18015 0008)
- Site 95 (alternatively identified using: 18157 0019)
- Site 96 (alternatively identified using: 18153 0007)
- Site 97 (alternatively identified using: 18023 0018)
- Site 99 (alternatively identified using: 18099 0011)
- Site 101 (alternatively identified using: 18097 0079)
- Site 102 (alternatively identified using: 18097 0168 and 18097 0169)
- Site 103 (alternatively identified using: 18097 0096)
- Site 104 (alternatively identified using: 18097 0079)
- Site 105 (alternatively identified using: 18097 0168 and 18097 0169)
- Site 106 (alternatively identified using: 18097 0104)
- Site 107 (alternatively identified using: 18097 0054)
- Site 109 (alternatively identified using: 18097 0123)
- Site 110 (alternatively identified using: 18097 0019)
- Site 111 (alternatively identified using: 18097 0050)
- Site 112 (alternatively identified using: 18063 0034)
- Site 113 (alternatively identified using: 18097 0096)
- Site 114 (alternatively identified using: 18097 0057)
- Site 115 (alternatively identified using: 18063 0035)
- Site 117 (alternatively identified using: 18063 0019)
- Site 118 (alternatively identified using: 18097 0215)
- Site 119 (alternatively identified using: 18097 0158)
- Site 120 (alternatively identified using: 18097 0103)
- Site 121 (alternatively identified using: 18097 0101, 18097 0067, and 18097 0100)
- Site 122 (alternatively identified using: 18097 0101, 18097 0067, and 18097 0100)
- Site 123 (alternatively identified using: 18097 0101, 18097 0067, and 18097 0100)
- Site 127 (alternatively identified using: 18097 0162)

- Site 129 (alternatively identified using: 18097 0018)
- Site 131 (alternatively identified using: 18097 0058)
- Site 133 (alternatively identified using: 18097 0096)
- Site 135 (alternatively identified using: 18097 0155)
- Site 136 (alternatively identified using: 18097 0075)
- Site 137 (alternatively identified using: 18097 0200)
- Site 138 (alternatively identified using: 18097 0200)
- Site 139 (alternatively identified using: 18097 0139)
- Site 140 (alternatively identified using: 18097 0089)
- Site 141 (alternatively identified using: 18097 0154)
- Site 142 (alternatively identified using: 18097 0155)
- Site 143 (alternatively identified using: 18097 0214)
- Site 144 (alternatively identified using: 18097 0102)
- Site 145 (alternatively identified using: 18097 0102)
- Site 147 (alternatively identified using: 18097 0135)
- Site 148 (alternatively identified using: 18097 0169)
- Site 149 (alternatively identified using: 18097 0123)
- Site 150 (alternatively identified using: 18097 0121)
- Site 151 (alternatively identified using: 18097 0062)
- Site 152 (alternatively identified using: 18097 0155)
- Site 153 (alternatively identified using: 18097 0076)
- Site 154 (alternatively identified using: 18097 0120)
- Site 158 (alternatively identified using: 18167 0041)
- Site 161 (alternatively identified using: 18029 0012)
- Site 162 (alternatively identified using: 18157 0033)
- Site 165 (alternatively identified using: 18029 0010)
- Site 166 (alternatively identified using: 18041 0017)
- Site 168 (alternatively identified using: 18051 0002)
- Site 169 (alternatively identified using: 18051 0003)
- Site 172 (alternatively identified using: 18101 0033 and 18101 0002)
- Site 173 (alternatively identified using: 18167 0149 and 18167 0032)
- Site 174 (alternatively identified using: 18181 0037 and 18181 0038)
- Site 175 (alternatively identified using: 18015 0008)
- Site 177 (alternatively identified using: 18143 0017)
- Site 178 (alternatively identified using: 18095 0010)
- Site 179 (alternatively identified using: 18163 0109 and 18163 0025)
- Site 180 (alternatively identified using: 18163 0043 and 18163 0046)
- Site 181 (alternatively identified using: 18051 0029)



- Site 182 (alternatively identified using: 18157 0029 and 18157 0030)
- Site 184 (alternatively identified using: 18097 0155)
- Site 187 (alternatively identified using: 18089 0201)
- Site 188 (alternatively identified using: 18091 0139 and 18091 0077)
- Site 189 (alternatively identified using: 17005 0017)
- Site 190 (alternatively identified using: 17011 0001)
- Site 191 (alternatively identified using: 17011 0002)
- Site 192 (alternatively identified using: 17011 0003)
- Site 193 (alternatively identified using: 17011 0004)
- Site 197 (alternatively identified using: 17011 0009)
- Site 198 (alternatively identified using: 17023 0023)
- Site 200 (alternatively identified using: 17031 0086)
- Site 201 (alternatively identified using: 17031 0087)
- Site 203 (alternatively identified using: 17031 0138 and 17031 0512)
- Site 204 (alternatively identified using: 17031 0140)
- Site 207 (alternatively identified using: 17031 0231)
- Site 208 (alternatively identified using: 17031 0253, 17031 0254, and 17031 0460)
- Site 209 (alternatively identified using: 17031 0269, 17031 0270, and 17031 0552)
- Site 210 (alternatively identified using: 17031 0306 and 17031 0509)
- Site 211 (alternatively identified using: 17031 0342)
- Site 215 (alternatively identified using: 17031 0397)
- Site 217 (alternatively identified using: 17031 0404)
- Site 220 (alternatively identified using: 17031 0501)
- Site 221 (alternatively identified using: 17031 0503)
- Site 222 (alternatively identified using: 17031 0505)
- Site 223 (alternatively identified using: 17031 0506)
- Site 224 (alternatively identified using: 17031 0508)
- Site 225 (alternatively identified using: 17031 0510)
- Site 226 (alternatively identified using: 17031 0511)
- Site 227 (alternatively identified using: 17031 0514)
- Site 230 (alternatively identified using: 17049 0015)
- Site 231 (alternatively identified using: 17051 0018)
- Site 233 (alternatively identified using: 17063 0005)
- Site 237 (alternatively identified using: 17063 0013)
- Site 239 (alternatively identified using: 17063 0016)
- Site 240 (alternatively identified using: 17063 0017)
- Site 241 (alternatively identified using: 17099 0009)
- Site 242 (alternatively identified using: 17099 0011)

- Site 243 (alternatively identified using: 17099 0012)
- Site 244 (alternatively identified using: 17099 0014)
- Site 245 (alternatively identified using: 17099 0016)
- Site 246 (alternatively identified using: 17099 0019)
- Site 247 (alternatively identified using: 17099 0021)
- Site 248 (alternatively identified using: 17099 0023)
- Site 249 (alternatively identified using: 17099 0024)
- Site 250 (alternatively identified using: 17099 0025)
- Site 251 (alternatively identified using: 17099 0031)
- Site 252 (alternatively identified using: 17099 0036)
- Site 253 (alternatively identified using: 17099 0046)
- Site 254 (alternatively identified using: 17099 0048)
- Site 255 (alternatively identified using: 17099 0049)
- Site 256 (alternatively identified using: 17099 0050)
- Site 257 (alternatively identified using: 17099 0055)
- Site 258 (alternatively identified using: 17099 0057)
- Site 259 (alternatively identified using: 17099 0058)
- Site 260 (alternatively identified using: 17099 0059)
- Site 261 (alternatively identified using: 17099 0060)
- Site 262 (alternatively identified using: 17099 0061)
- Site 263 (alternatively identified using: 17099 0064)
- Site 264 (alternatively identified using: 17099 0066)
- Site 265 (alternatively identified using: 17099 0069)
- Site 266 (alternatively identified using: 17099 0070)
- Site 267 (alternatively identified using: 17099 0074)
- Site 268 (alternatively identified using: 17099 0076)
- Site 269 (alternatively identified using: 17099 0077)
- Site 270 (alternatively identified using: 17099 0078)
- Site 271 (alternatively identified using: 17099 0080)
- Site 272 (alternatively identified using: 17099 0081)
- Site 273 (alternatively identified using: 17099 0082)
- Site 274 (alternatively identified using: 17099 0083)
- Site 275 (alternatively identified using: 17099 0084)
- Site 276 (alternatively identified using: 17099 0085)
- Site 277 (alternatively identified using: 17099 0086)
- Site 278 (alternatively identified using: 17099 0090)
- Site 293 (alternatively identified using: 18003 0003)
- Site 299 (alternatively identified using: 18003 0028)

- Site 301 (alternatively identified using: 18003 0036)
- Site 303 (alternatively identified using: 18003 0039)
- Site 304 (alternatively identified using: 18005 0012)
- Site 305 (alternatively identified using: 18005 0014)
- Site 306 (alternatively identified using: 18005 0015)
- Site 307 (alternatively identified using: 18005 0017)
- Site 308 (alternatively identified using: 18005 0018)
- Site 309 (alternatively identified using: 18019 0004)
- Site 310 (alternatively identified using: 18019 0020)
- Site 311 (alternatively identified using: 18019 0025)
- Site 312 (alternatively identified using: 18019 0029)
- Site 314 (alternatively identified using: 18019 0064)
- Site 315 (alternatively identified using: 18019 0067)
- Site 316 (alternatively identified using: 18019 0071)
- Site 317 (alternatively identified using: 18021 0011)
- Site 322 (alternatively identified using: 18033 0025)
- Site 325 (alternatively identified using: 18035 0032)
- Site 326 (alternatively identified using: 18043 0010)
- Site 328 (alternatively identified using: 18043 0013)
- Site 329 (alternatively identified using: 18043 0018)
- Site 330 (alternatively identified using: 18043 0020)
- Site 332 (alternatively identified using: 18051 0005)
- Site 333 (alternatively identified using: 18051 0009)
- Site 334 (alternatively identified using: 18063 0014)
- Site 337 (alternatively identified using: 18063 0044)
- Site 339 (alternatively identified using: 18071 0005)
- Site 340 (alternatively identified using: 18079 0014)
- Site 343 (alternatively identified using: 18081 0003)
- Site 344 (alternatively identified using: 18083 0048)
- Site 345 (alternatively identified using: 18083 0049)
- Site 346 (alternatively identified using: 18083 0054)
- Site 347 (alternatively identified using: 18083 0055)
- Site 348 (alternatively identified using: 18085 0034)
- Site 349 (alternatively identified using: 18085 0035)
- Site 350 (alternatively identified using: 18085 0036)
- Site 354 (alternatively identified using: 18089 0056)
- Site 355 (alternatively identified using: 18089 0060)
- Site 358 (alternatively identified using: 18089 0091)

- Site 359 (alternatively identified using: 18089 0108)
- Site 360 (alternatively identified using: 18089 0109)
- Site 363 (alternatively identified using: 18089 0134)
- Site 366 (alternatively identified using: 18091 0081)
- Site 367 (alternatively identified using: 18091 0096)
- Site 369 (alternatively identified using: 18091 0151)
- Site 371 (alternatively identified using: 18093 0092)
- Site 372 (alternatively identified using: 18095 0001)
- Site 373 (alternatively identified using: 18095 0003)
- Site 374 (alternatively identified using: 18095 0022)
- Site 375 (alternatively identified using: 18097 0015)
- Site 376 (alternatively identified using: 18097 0031)
- Site 377 (alternatively identified using: 18097 0051)
- Site 378 (alternatively identified using: 18097 0053)
- Site 379 (alternatively identified using: 18097 0055)
- Site 380 (alternatively identified using: 18097 0059)
- Site 381 (alternatively identified using: 18097 0060)
- Site 382 (alternatively identified using: 18097 0069)
- Site 383 (alternatively identified using: 18097 0072)
- Site 384 (alternatively identified using: 18097 0082)
- Site 385 (alternatively identified using: 18097 0086)
- Site 387 (alternatively identified using: 18097 0094)
- Site 388 (alternatively identified using: 18097 0119)
- Site 389 (alternatively identified using: 18097 0126)
- Site 390 (alternatively identified using: 18097 0129)
- Site 391 (alternatively identified using: 18097 0134)
- Site 392 (alternatively identified using: 18097 0144)
- Site 393 (alternatively identified using: 18097 0148)
- Site 394 (alternatively identified using: 18097 0152)
- Site 395 (alternatively identified using: 18097 0157)
- Site 398 (alternatively identified using: 18097 0179)
- Site 399 (alternatively identified using: 18097 0186)
- Site 400 (alternatively identified using: 18097 0188)
- Site 401 (alternatively identified using: 18097 0189)
- Site 402 (alternatively identified using: 18097 0190)
- Site 403 (alternatively identified using: 18097 0191)
- Site 404 (alternatively identified using: 18097 0196)
- Site 406 (alternatively identified using: 18097 0198)

- Site 407 (alternatively identified using: 18097 0201)
- Site 408 (alternatively identified using: 18097 0208)
- Site 409 (alternatively identified using: 18099 0003)
- Site 410 (alternatively identified using: 18105 0026)
- Site 411 (alternatively identified using: 18105 0041)
- Site 412 (alternatively identified using: 18105 0043)
- Site 414 (alternatively identified using: 18107 0005)
- Site 415 (alternatively identified using: 18111 0003)
- Site 416 (alternatively identified using: 18127 0019)
- Site 417 (alternatively identified using: 18127 0020)
- Site 418 (alternatively identified using: 18127 0023)
- Site 419 (alternatively identified using: 18127 0092)
- Site 420 (alternatively identified using: 18127 0109)
- Site 427 (alternatively identified using: 18145 0010)
- Site 428 (alternatively identified using: 18145 0012)
- Site 430 (alternatively identified using: 18153 0005)
- Site 431 (alternatively identified using: 18157 0017)
- Site 432 (alternatively identified using: 18157 0024)
- Site 435 (alternatively identified using: 18161 0022)
- Site 436 (alternatively identified using: 18163 0028)
- Site 437 (alternatively identified using: 18163 0123)
- Site 438 (alternatively identified using: 18163 0125)
- Site 439 (alternatively identified using: 18163 0147)
- Site 440 (alternatively identified using: 18163 0168)
- Site 441 (alternatively identified using: 18163 0172)
- Site 442 (alternatively identified using: 18166 0022)
- Site 443 (alternatively identified using: 18167 0001)
- Site 444 (alternatively identified using: 18167 0047)
- Site 445 (alternatively identified using: 18167 0089)
- Site 448 (alternatively identified using: 18177 0022)
- Site 449 (alternatively identified using: 18177 0024)
- Site 450 (alternatively identified using: 18177 0025)
- Site 451 (alternatively identified using: 18181 0026)
- Site 452 (alternatively identified using: 18183 0003)

See [[Dkt. 745 at 49-52](#), 81-84, 105-07, 113-15, 119-24, 127-33, 137, 139-48, 155, and 157-58].

### **III. Claims Withdrawn by Plaintiff Following the Summary Judgment Order**

Following the parties' Joint Report, [[Dkt. 609](#)], Plaintiff withdrew the following claims:

- Site 124 (alternatively identified using 18097 0062): trespass to components
- Site 318 (alternatively identified using 18021 0029): trespass to components
- Site 319 (alternatively identified using 18021 0034): trespass to components
- Site 321 (alternatively identified using 18033 0001): trespass to components
- Site 324 (alternatively identified using 18035 0029): trespass to components
- Site 342 (alternatively identified using 18079 0032): trespass to components
- Site 352 (alternatively identified using 18089 0026): trespass to components
- Site 353 (alternatively identified using 18089 0033): trespass to components
- Site 413 (alternatively identified using 18105 0052): trespass to components
- Site 429 (alternatively identified using 18145 0015): trespass to components

See [[Dkt. 745 at 70](#), 185, 188, 191-92, 195, 206, 213, 216, 218, 252, and 266].

### **IV. Illinois Sites Dismissed for Lack of Personal Jurisdiction Ruling**

As noted above, the Court recently dismissed all Illinois sites for lack of personal jurisdiction. [[Dkt. 741](#).] That ruling eliminated all claims for the following sites:

- Site 41 (alternatively identified using: 17051 0027)
- Site 42 (alternatively identified using: 17051 0027)
- Site 43 (alternatively identified using: 17163 0032)
- Site 194 (alternatively identified using: 17011 0005)
- Site 195 (alternatively identified using: 17011 0006)
- Site 196 (alternatively identified using: 17011 0007)
- Site 199 (alternatively identified using: 17031 00045)
- Site 202 (alternatively identified using: 17031 0129 and 17031 0511)
- Site 216 (alternatively identified using: 17031 0398)
- Site 218 (alternatively identified using: 17031 0498)
- Site 228 (alternatively identified using: 17035 0021)
- Site 229 (alternatively identified using: 17049 0002)
- Site 232 (alternatively identified using: 17063 0004)
- Site 234 (alternatively identified using: 17063 0006)
- Site 235 (alternatively identified using: 17063 0010)
- Site 236 (alternatively identified using: 17063 0012)
- Site 238 (alternatively identified using: 17063 0015)
- Site 279 (alternatively identified using: 17197 0007)

- Site 280 (alternatively identified using: 17197 0008)
- Site 281 (alternatively identified using: 17197 0009)
- Site 282 (alternatively identified using: 17197 0011)
- Site 283 (alternatively identified using: 17197 0013)
- Site 284 (alternatively identified using: 17197 0014)
- Site 285 (alternatively identified using: 17197 0015)
- Site 286 (alternatively identified using: 17197 0017)
- Site 287 (alternatively identified using: 17197 0018)
- Site 288 (alternatively identified using: 17197 0027)
- Site 289 (alternatively identified using: 17197 0034)
- Site B (alternatively identified using: 17049 0005)

See [[Dkt. 745 at 52](#), 130-33, 148, and 159].

#### **V. Sites Impacted by Ruling on Motion to Dismiss for Lack of Standing**

By separate Order, the Undersigned has issued a Report and Recommendation that recommends that Defendant's Partial Motion to Dismiss Count VI and Count IV under Rule 12(b)(1), [[Dkt. 637](#)], be granted in its entirety. If that recommendation is wholly adopted by the Court, no claims will remain as to the following sites:

- Site 45 (alternatively identified using: 18133 0021)
- Site 46 (alternatively identified using: 18133 0021)
- Site 47 (alternatively identified using: 18133 0021)
- Site 49 (alternatively identified using: 18133 0021)
- Site 53 (alternatively identified using: 18097 0214)
- Site 56 (alternatively identified using: 18073 0012)
- Site 62 (alternatively identified using: 18051 0018)
- Site 64 (alternatively identified using: 18063 0040)
- Site 66 (alternatively identified using 18107 0036)
- Site 67 (alternatively identified using: 18107 0011 and 18107 0012 and 18107 0013)
- Site 68 (alternatively identified using: 18167 0045)
- Site 69 (alternatively identified using: 18167 0101)
- Site 74 (alternatively identified using: 18071 0040)
- Site 78 (alternatively identified using 18135 0017)
- Site 100 (alternatively identified using: 18097 0096)
- Site 108 (alternatively identified using: 18097 0104)
- Site 155 (alternatively identified using: 18167 0106 and 18167 0132)



- Site 156 (alternatively identified using: 18167 0086)
- Site 159 (alternatively identified using: 18167 0132)
- Site 163 (alternatively identified using: 18107 0041)
- Site 183 (alternatively identified using: 18011 0016)
- Site 291 (alternatively identified using: 18001 0005)
- Site 296 (alternatively identified using: 18003 0024)
- Site 302 (alternatively identified using: 18003 0038)
- Site 313 (alternatively identified using: 18019 0061)
- Site 323 (alternatively identified using: 18033 0035)
- Site 327 (alternatively identified using: 18043 0011)
- Site 331 (alternatively identified using: 18043 0023)
- Site 336 (alternatively identified using 18063 0024)
- Site 341 (alternatively identified using 18079 0022)
- Site 356 (alternatively identified using: 18089 0063)
- Site 357 (alternatively identified using: 18089 0064)
- Site 361 (alternatively identified using: 18089 0116)
- Site 362 (alternatively identified using: 18089 0117)
- Site 364 (alternatively identified using: 18089 0145)
- Site 365 (alternatively identified using: 18089 0149)
- Site 368 (alternatively identified using: 18091 0098)
- Site 370 (alternatively identified using: 18093 0037)
- Site 386 (alternatively identified using: 18097 0092)
- Site 405 (alternatively identified using: 18097 0197)
- Site 422 (alternatively identified using: 18133 0014)
- Site 423 (alternatively identified using: 18133 0025)
- Site 426 (alternatively identified using: 18133 0060)
- Site 429 (alternatively identified using: 18145 0015)
- Site 433 (alternatively identified using: 18157 0049)
- Site 434 (alternatively identified using: 18157 0065)
- Site A (alternatively identified using: 18133 0021)
- Site C (alternatively identified using: 18133 0014)

See [[Dkt. 745 at 52](#), 82-83, 104-06, 114-15, 123-24, 127, 129, 133, 135, 137, 139, 140-41, 144-47, 154-58, and 162-63; Hearing Transcript, January 17, 2025, at p. 2].

In addition, if the Undersigned's Report and Recommendation that recommends that Defendant's Partial Motion to Dismiss Count VI and Count IV under Rule 12(b)(1), [[Dkt. 637](#)],



be granted in its entirety is wholly adopted by the Court, the following additional claims will be dismissed:<sup>6</sup>

- Site 59 (alternatively identified using: 18097 0124): trespass to components
- Site 61 (alternatively identified using: 18097 0077 and 18097 0183): trespass to components
- Site 63 (alternatively identified using 18097 0101, 18097 0067, and 18097 0100): trespass to components
- Site 71 (alternatively identified using 18135 0019): trespass to components
- Site 72 (alternatively identified using 18079 0026): trespass to components
- Site 76 (alternatively identified using 18071 0027): trespass to components
- Site 80 (alternatively identified using 18089 0159 and 18089 0142): trespass to components
- Site 85 (alternatively identified using 18011 0012): trespass to components
- Site 87 (alternatively identified using 18091 0138): trespass to components
- Site 116 (alternatively identified using 18063 0037): trespass to components
- Site 125 (alternatively identified using 18097 0154): trespass to components
- Site 126 (alternatively identified using 18097 0155): trespass to components
- Site 128 (alternatively identified using 18097 0160): trespass to components
- Site 130 (alternatively identified using 18097 0061 and 18097 0073): trespass to components
- Site 134 (alternatively identified using 18097 0054): trespass to components
- Site 146 (alternatively identified using 18097 0085): trespass to components
- Site 157 (alternatively identified using 18167 0090 and 18167 0048): trespass to components
- Site 160 (alternatively identified using 18167 0090 and 18167 0048): trespass to components
- Site 167 (alternatively identified using 18097 0199): trespass to components
- Site 170 (alternatively identified using 18097 0089): trespass to components
- Site 185 (alternatively identified using 18097 0169 and 18097 0168): trespass to components
- Site 186 (alternatively identified using 18113 0039): trespass to components
- Site 290 (alternatively identified using 18001 0003): trespass to components
- Site 292 (alternatively identified using 18003 0001): trespass to components
- Site 294 (alternatively identified using 18003 0004): trespass to components
- Site 295 (alternatively identified using 18003 0023): trespass to components
- Site 297 (alternatively identified using 18003 0026): trespass to components

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<sup>6</sup> The other claims asserted as to these sites are addressed elsewhere in this Order.

- Site 298 (alternatively identified using 18003 0027): trespass to components
- Site 300 (alternatively identified using 18003 0029): trespass to components
- Site 320 (alternatively identified using 18023 0011): trespass to components
- Site 335 (alternatively identified using 18063 0015): trespass to components
- Site 351 (alternatively identified using 18089 0011): trespass to components
- Site 396 (alternatively identified using 18097 0165): trespass to components
- Site 397 (alternatively identified using 18097 0166): trespass to components
- Site 421 (alternatively identified using 18133 0003): trespass to components
- Site 424 (alternatively identified using 18133 0058): trespass to components
- Site 425 (alternatively identified using 18133 0059): trespass to components
- Site 446 (alternatively identified using 18167 0113): trespass to components
- Site 447 (alternatively identified using 18167 0114): trespass to components
- Site D (alternatively identified using 18133 0058): trespass to components
- Site E (alternatively identified using 18097 0199): trespass to components

#### **VI. Claims the Parties Agree Remain for Trial**

The parties agree that the following claims remain for trial.

- Site 59 (alternatively identified using: 18097 0124): civil trespass to land; rent; criminal trespass; theft
- Site 60 (alternatively identified using 18167 0028): civil trespass to land and rent
- Site 61 (alternatively identified using: 18097 0077 and 18097 0183): civil trespass to land and rent<sup>7</sup>
- Site 63 (alternatively identified using 18097 0101, 18097 0067, and 18097 0100): civil trespass to land and rent
- Site 71 (alternatively identified using 18135 0019): civil trespass to land and rent
- Site 72 (alternatively identified using 18079 0026): civil trespass to land and rent
- Site 76 (alternatively identified using: 18071 0027): civil trespass to land and rent
- Site 80 (alternatively identified using 18089 0159 and 18089 0142): civil trespass to land and rent
- Site 85 (alternatively identified using 18011 0012): civil trespass to land and rent
- Site 87 (alternatively identified using 18091 0138): civil trespass to land; rent; criminal trespass; and theft
- Site 116 (alternatively identified using 18063 0037): civil trespass to land; rent; criminal trespass; and theft

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<sup>7</sup> Defendant conceded during the hearing that a question of fact remains to be tried as to this site. See [[Dkt. 745 at 103](#)].

- Site 124 (alternatively identified using 18097 0062): civil trespass to land; rent; criminal trespass; and theft
- Site 125 (alternatively identified using 18097 0154): civil trespass to land and rent
- Site 126 (alternatively identified using 18097 0155): civil trespass to land and rent
- Site 128 (alternatively identified using 18097 0160): civil trespass to land and rent
- Site 130 (alternatively identified using 18097 0061 and 18097 0073): civil trespass to land and rent
- Site 134 (alternatively identified using 18097 0054): civil trespass to land; rent; criminal trespass; and theft
- Site 146 (alternatively identified using 18097 0085): civil trespass to land and rent<sup>8</sup>
- Site 157 (alternatively identified using 18167 0090 and 18167 0048): civil trespass to land and rent
- Site 160 (alternatively identified using 18167 0090 and 18167 0048): civil trespass to land and rent<sup>9</sup>
- Site 167 (alternatively identified using 18097 0199): civil trespass to land and rent
- Site 170 (alternatively identified using 18097 0089): civil trespass to land and rent
- Site 185 (alternatively identified using 18097 0169 and 18097 0168): civil trespass to land and rent
- Site 186 (alternatively identified using 18113 0039): civil trespass to land and rent
- Site 290 (alternatively identified using 18001 0003): civil trespass to land and rent
- Site 292 (alternatively identified using 18003 0001): civil trespass to land; rent; criminal trespass; and theft
- Site 294 (alternatively identified using 18003 0004): civil trespass to land and rent
- Site 295 (alternatively identified using 18003 0023): civil trespass to land and rent
- Site 297 (alternatively identified using 18003 0026): civil trespass to land and rent
- Site 298 (alternatively identified using 18003 0027): civil trespass to land and rent
- Site 300 (alternatively identified using 18003 0029): civil trespass to land; rent; criminal trespass; and theft
- Site 318 (alternatively identified using 18021 0029): civil trespass to land and rent
- Site 319 (alternatively identified using 18021 0034): civil trespass to land; rent; criminal trespass; and theft
- Site 320 (alternatively identified using 18023 0011): civil trespass to land; rent; criminal trespass; and theft
- Site 321 (alternatively identified using 18033 0001): civil trespass to land and rent

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<sup>8</sup> Defendant conceded during the hearing that a question of fact remains to be tried as to this site. See [[Dkt. 745 at 122-23](#)].

<sup>9</sup> Defendant had raised a statute of limitation argument with regard to this site, but agreed during the second hearing that the claims would proceed to trial. Hearing Transcript, January 17, 2025, at p. 2. In so agreeing, Defendant does not waive its statute of limitation argument.

- Site 324 (alternatively identified using 18035 0029): civil trespass to land; rent; criminal trespass; and theft
- Site 335 (alternatively identified using 18063 0015): civil trespass to land and rent
- Site 338 (alternatively identified using 18065 0006): civil trespass to land and rent
- Site 342 (alternatively identified using 18079 0032): civil trespass to land and rent
- Site 351 (alternatively identified using 18089 0011): civil trespass to land and rent
- Site 352 (alternatively identified using 18089 0026): civil trespass to land and rent
- Site 353 (alternatively identified using 18089 0033): civil trespass to land and rent
- Site 396 (alternatively identified using 18097 0165): civil trespass to land and rent
- Site 397 (alternatively identified using 18097 0166): civil trespass to land and rent
- Site 413 (alternatively identified using 18105 0052): civil trespass to land and rent
- Site 421 (alternatively identified using 18133 0003): civil trespass to land and rent<sup>10</sup>
- Site 424 (alternatively identified using 18133 0058): civil trespass to land and rent
- Site 425 (alternatively identified using 18133 0059): civil trespass to land and rent
- Site 446 (alternatively identified using 18167 0113): civil trespass to land and rent
- Site 447 (alternatively identified using 18167 0114): civil trespass to land; rent; criminal trespass; and theft
- Site D (alternatively identified using 18133 0058): civil trespass to land and rent
- Site E (alternatively identified using 18097 0199): civil trespass to land and rent

See [[Dkt. 745 at 84](#), 103, 107, 116, 119-23 130, 134-35, 137-39, 141-43, 146-48, 155, 157-58, 163, and 236]; Hearing Transcript, January 17, 2025, at p. 2-3, 5.

The Undersigned notes that, prior to the second day of the hearing, the parties continued to disagree on some of these sites, which the parties referred to as "mixed sites"; that is, sites at which Plaintiff owns a fee interest for part of the site and an easement for the rest of the site.<sup>11</sup>

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<sup>10</sup> The parties reported during the second day of the hearing that they had resolved their dispute regarding whether claims remained for trial regarding this site. Hearing Transcript, January 17, 2025, at p. 5.

<sup>11</sup> The mixed sites for which the parties now agree claims remain for trial are: Site 60, Site 63, Site 71, Site 72, Site 80, Site 87, Site 124, Site 134, Site 157, Site 160, Site 167, Site 290, Site 292, Site 295, Site 297, Site 298, Site 300, and Site E. Hearing Transcript, January 17, 2025, at p. 2-3. The parties now agree that the cable installations at Site 66, Site 78, Site 336, and Site 341 are located only on the easement portions of the sites, *id.* at 4, which means that no claims remain for trial as to these sites, as all of the asserted claims have been resolved by the summary judgment ruling and/or the Undersigned's ruling on the motion to dismiss (if it is adopted in its entirety).

Pursuant to the summary judgment order, Plaintiff cannot pursue claims for criminal trespass, civil trespass to land, rent, or unjust enrichment based on an easement interest because Plaintiff lacks standing to do so. Pursuant to the Undersigned's Report and Recommendation, that is also true for Plaintiff's theft claims. Therefore, in order to get to trial with regard to each mixed site, Plaintiff was required to present evidence that showed that Defendant's cable installation on the site encroached on the part of the site in which Plaintiff owns a fee interest. If the cable installation on a mixed site falls solely on Plaintiff's easement, Plaintiff has no standing to raise those claims and they must be dismissed.

Initially, the parties disagreed whether Plaintiff was entitled to rely on evidence that it did not submit at the summary judgment stage to show that the cable installations encroach on the fee portion of each mixed site. Defendant moved to strike such evidence, [[Dkt. 717](#)], pointing to the following statement in the Court's Order referring this issue to the Undersigned for a Report and Recommendation:

The evidence the parties may present at the hearing is limited to evidence already produced in discovery and any other evidence to which the parties can agree. The Court notes that discovery has closed and that the basis of its summary judgment ruling as to many sites was the failure of [Plaintiff] to introduce evidence as to the precise nature of its property interest in the site at issue. The upcoming hearing is not an opportunity for [Plaintiff] to expand upon the record it already produced.

[[Dkt. 644 at 2.](#)] Taken literally and without context, this statement supports Defendant's argument in its motion to strike. However, Defendant quite properly also acknowledged the following, related statement in the Undersigned's Order setting the hearing on this issue:

This invitation to submit additional evidence does not mean that all of the submitted evidence necessarily will be considered by the Court. Evidence that should have been submitted in support of or in opposition to the motion for partial

summary judgment will not be considered as to Issue One<sup>12</sup> unless agreed to by the parties.

[[Dkt. 673](#)] (footnote added). This statement gives the necessary context for the original statement. Obviously, if there was no reason for Plaintiff to submit particular evidence in response to the motion for summary judgment, because the evidence was not relevant to the specific issues raised in that motion, then it would be improper to exclude that evidence at this stage of the case.

During the first day of the hearing, the Undersigned noted that that was precisely the situation with regard to the new evidence submitted by Plaintiff regarding the mixed sites—specifically, evidence that shows whether the cable installation(s) on a given site is located, in whole or in part, on the portion of the site owned in fee by Plaintiff. None of the arguments made in the motion for summary judgment would have been rebutted by this evidence, so there was no reason for Plaintiff to submit such evidence in response to that motion. The issue on summary judgment involved the nature of the rights that flowed from the grant of an easement to Plaintiff on any given site—which is the evidence the Court noted Plaintiff failed to provide—not whether a given site was an easement site, a fee site, or a mixed site, and, if a mixed site, where the cable installation was located on the site.

Apparently taking the Undersigned's comments to heart, Defendant subsequently agreed that, as to the mixed sites for which Plaintiff had evidence—whether presented at the summary judgment stage or not—that the cable installation at the site is located on the fee portion of the site, that site remained at issue for trial. Accordingly, the motion to strike, [[Dkt. 717](#)], is **DENIED AS MOOT** as to the evidence relevant to the "mixed sites" issue.

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<sup>12</sup> "Issue One" refers to the issue of "which claims as to each site were resolved by the Court's summary judgment ruling and which claims remain for trial."

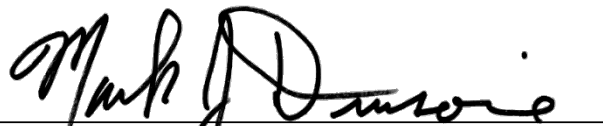
## VII. Conclusion

The status of many of the sites in this case following the summary judgment ruling has been a moving target, and it certainly would have been better for all involved if the parties had done the work necessary to examine the evidence of record and agree upon which claims remained for trial in response to Judge Magnus-Stinson's initial order to do so. In the end, after substantial briefing, a hearing, and the dismissal of the Illinois claims, the parties were able to reach agreement based on the evidence of record. Thus, if the Undersigned's Report and Recommendation granting Defendant's partial motion to dismiss is adopted in its entirety, those claims listed in Part VI above will be the claims to be decided at the trial of this case.

Any objections to this Report and Recommendation shall be filed with the Clerk in accordance with [28 U.S.C. § 636\(b\)\(1\)](#) and [Fed. R. Civ. P. 72\(b\)](#), and failure to timely file objections within fourteen days after service shall constitute a waiver of subsequent review absent a showing of good cause for such failure.

SO ORDERED.

Dated: 22 JAN 2025



Mark J. Dinsmore  
United States Magistrate Judge  
Southern District of Indiana

Distribution:

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